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No. 97-1267

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

PROFESSIONAL PILOTS FEDERATION, WILLIAM T. REINERS, III, PHILLIP T. SHAW,
Petitioners

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* SOUTHWEST AIRLINES PILOTS' ASSOCIATION, THE ORGANIZATION OF BLACK AIRLINE PILOTS, INC. AND AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

The court below held that a Federal Aviation Administration regulation that requires scheduled airline pilots to cease work at age 60 was a reasonable exercise of agency discretion. In so ruling, the court held that the FAA was not bound by the requirement of the Age Discrimination in Employment Act (ADEA) that any age-based prohibition on employment meet the requirements for a bona fide occupational qualification (BFOQ). The Equal Employment Opportunity Commission, the agency that administers the ADEA, has consistently taken the position that the Age 60 Rule is not a BFOQ. The questions presented are:

(1) Whether the Federal Aviation Administration's general power to regulate air commerce and safety implies the power to relieve airline employers of their specific statutory obligation to avoid age-based discharge under the ADEA.

(2) Whether a federal agency regulation that contravenes the policy of another federal agency acting within the scope of its governing statute should be subject to a more exacting standard of review than a regulation that does not infringe on conflicting governmental policies.

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The Southwest Airlines Pilots' Association (SWAPA), The Organization of Black Airline Pilots, Inc. (OBAP) and the American Association of Retired Persons (AARP)[1]

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[1] Counsel of record wholly authored this brief. No persons or entities than *amicus curiae* have made a monetary contribution to its preparation or submission.

respectfully request the Court to grant the petition for writ of certiorari of the Professional Pilots Federation, William T. Reiners, III, and Phillip T. Shaw in this case.

CONSENTS GRANTED

Petitioners and respondent have given their respective consents to *amicus curiae* SWAPA, OBAP and AARP filing a brief in support of the petition for certiorari.

STATEMENT OF INTEREST OF *AMICUS CURIAE* SOUTHWEST AIRLINES PILOTS' ASSOCIATION

SWAPA is an association of 2,542 professional pilots employed by Southwest Airlines Company. As pilots working for an air carrier subject to Part 121 of the Federal Aviation Regulations, 14 C.F.R., Part 121, SWAPA's members are subject to the Federal Aviation Administration's "Age 60 Rule," 14 C.F.R. §121.383(c). The Rule requires SWAPA's members to retire from scheduled passenger service once they reach Age 60. Once they are forced into retirement, few members can find comparable employment as pilots in operations not subject to Part 121 (e.g., corporate aircraft or non-U.S. airlines).

Although retirement at age 60 may suit the economic interest of pilots who fly for a few of the major airlines where the pension plans and seniority are structured around the Age 60 Rule,[2] it adversely affects pilots in independent

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[2] The two largest airline pilot unions, the Air Line Pilots Association (ALPA) and the Allied Pilots Association (APA) opposed below any change to the Age 60 Rule. See Comments of APA, Age 60 Docket (FAA Docket No. 27264) (R. 292 (reference to the record in the joint appendix on appeal below)); Comments of ALPA, Age 60 Docket (R. 341); *Amicus Curiae* Brief of APA in the court of appeals; Notice of

airlines such as Southwest. Southwest has experienced enormous growth in the 27 years since it was founded in 1971. The majority of SWAPA's current membership have come on board within the last ten years. Many are older pilots who previously worked for other airlines, including ones that went bankrupt in the shakeout that followed deregulation. As a consequence, they do not have the security of a defined benefit pension plan structured around an age 60 retirement, as do pilots at the larger carriers. Instead, they must rely on the Southwest Airlines Pilots' Association 401(k) Plan and the Southwest Airlines Company Profit Sharing Plan, which are defined contribution plans.

Hence, Southwest Airlines pilots are required to fund a significantly higher percentage of their retirements than pilots at larger carriers. Thus, the right to work free of age discrimination, guaranteed by the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA) (1988), is especially important not only to SWAPA's members, but

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Amicus Curiae ALPA in the court of appeals. A large number of ALPA's and APA's membership are pilots who work for older, larger carriers where growth is slow, and, consequently, pilots can take a long time to advance from the entry level position of flight engineer to full captain. See, e.g., testimony of Capt. Tom Corboy, American Airlines (R. 448). SWAPA believes that these unions do not speak for pilots as a group but only for a vocal contingent of their respective memberships. In any event, their policies are driven by economic concerns. In testimony below before the FAA, APA's spokesman, Richard Lavoy acknowledges APA's belief that abolition of the Rule would "negatively impact promotions and compensation" (R. 404) and cause "hundreds of furloughs" as a result of the industry's alleged "current shrinkage and no-growth period" (R. 405). ALPA in its Comments to the FAA acknowledged that "Each ALPA collective agreement is based on the presumption of mandatory retirement at age 60," and that "salary and career progressions were established with the assumption that pilots would retire at age 60 and create opportunities for more junior pilots." (R. 359).

to a large cadre of other pilots who work for the younger, more progressive airlines.

SWAPA's interest in the safety of airline passengers and Southwest Airlines' safety record stand second to none. Southwest Airlines and its pilots place the safety of their passengers first. They don't want their passengers to fly on aircraft flown by unsafe pilots. SWAPA's members "ride" to their jobs on aircraft almost as often as they pilot aircraft. They don't want to ride on aircraft flown by unsafe pilots, and they don't want to co-pilot an aircraft with an unsafe pilot.

STATEMENT OF INTEREST OF THE ORGANIZATION OF BLACK AIRLINE PILOTS, INC.

OBAP is a non-profit corporation organized under the laws of the District of Columbia. Its purpose is to enhance, advance, and promote educational opportunities in aviation; to develop and sustain a process for the ongoing mentoring of youth; to monitor the development of aviation projects; and to protect the general interest of its members.

OBAP extends full membership to active, formerly active or retired cockpit crew members of any commercial air carrier and to any Federal Aviation Administration flight crew inspector. OBAP extends associate membership to those persons who are interested in the aviation industry and are not eligible for full membership. Presently, OBAP has 325 active full members and 1140 active associate members. Many of OBAP's full members are working or have worked for air carriers subject to Part 121 of the Federal Air Regulations and thus are or have been subject to the Age 60 Rule.

OBAP's interest in this case is two-fold: (1) it opposes the Age 60 Rule as unfairly and unlawfully discriminatory; and (2) it believes that if a federal agency is able to establish and continue a rule or practice that discriminates in contradiction of federal non-discrimination laws respecting age, similar unfair and unlawful practices may arise or expand to discrimination on the basis of race, gender, ethnicity or national origin.

STATEMENT OF INTEREST OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS

AARP is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy, and service to enhance the quality of life for all by promoting independence, dignity, and purpose in work and retirement.

More than one third of AARP's thirty-two million members are employed individuals, most of whom are protected by the ADEA, and state anti-discrimination laws. One of AARP's primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes, to encourage employers to hire and retain older workers, and to help older workers overcome the obstacles they face because of age.

AARP's concern in this case is that, based solely on age, the FAA Age 60 Rule mandatorily retires pilots who are otherwise physically and mentally fit and qualified to be productive members of the work force, with little or no

evidence that their reaching age 60 has any impact on airline safety. AARP has consistently opposed this rule because it is inconsistent with the purposes of the ADEA and contrary to public policy.

REASONS FOR GRANTING THE WRIT

The issues Petitioners present are of the highest importance. Congress with the ADEA has expressed the will of the electorate in enacting legislation barring discrimination based on age "with respect to [an individual's] compensation, terms, conditions, or privileges of employment" (29 U.S.C. §623(a)(1)), except where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (29 U.S.C.§623(f)(1)). Yet the FAA's Rule arbitrarily banishes U.S. commercial airline pilots from the captain and first officer seats the moment they turn 60.

As hinted at by the dissent below, what might not be arbitrary and capricious without the ADEA, may be with it. The Age 60 Rule was arbitrarily conceived and, having been politically nurtured for 38 years, has attained the veneer of venerability. Yet SWAPA believes the Rule survives because of political and economic, not safety considerations.[3] The

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[3]The Petition for Certiorari has detailed the history of the Rule and the decision below, but the role of ALPA and APA in influencing the FAA's decision to hold on to the Age 60 Rule deserves more explanation. The FAA's decision to reject the Hilton Report's recommendation to raise the age limit for Part 121 operations was largely based on the agency's acceptance of the criticism of the report voiced by David Michaels, a researcher whose study of accident data was subsidized by ALPA and APA (R. 73-74). Other arguments proffered by ALPA and APA, and adopted by the FAA, include the following: (1) the contention that "Medical science cannot accurately measure age-related deterioration in vitally important cognitive functions" (APA Comments, R. 296; cf.

dissent in the court of appeals aptly demonstrates why the Court should look below the veneer; such a look would reveal that the FAA has perpetuated the Age 60 Rule unjustly.

The Age 60 Rule is a government agency-erected monument to age discrimination.[4] As an affront to the spirit if not the letter of the ADEA, it should be given great scrutiny. While the Federal Aviation Act and the ADEA are silent as to each other, the FAA has been accorded extraordinary statutory power to be the arbiter of aviation safety, while at the same time it controls (and has precluded) the means to determine whether there is an appropriate basis for this arbitrary Rule. We refer to the fact that the FAA has refused to evaluate pilots over the age of 60, including refusing to grant any exemptions to allow even a select group of pilots to fly commercial aircraft beyond age 60. Pet. App. A at a-68-69. The premise of the Rule thus continues unevaluated.

With power comes responsibility. Petitioners speak of the FAA's decision as "power unrestrained" (Pet. at 22).

ALPA Comments, R. 356); (2) emphasis on the recommendations of the 1981 NIH Report as a basis for rejecting the recommendations of the 1993 Hilton Report (APA Comments, R. 298; ALPA Comments, R. 353); (3) the contention that simulator testing is inadequate to screen pilots over the age of 60 (APA Comments, R. 308; ALPA Comments, R. 357). By adopting the arguments espoused by ALPA and APA, the FAA abdicated its role as a disinterested decision maker acting in the public interest.

[4] As the dissent below cogently stated, "the Age 60 Rule stands as an instance of government-mandated age discrimination for a particular group of employees." Pet. App. A at a-38.

We see it as power abdicated.[5] Rather than monitoring too closely, it has abdicated monitoring individual fitness to fly in favor of an arbitrary age-based rule.[6] The FAA has failed to ameliorate the Rule in 38 years, despite the ADEA, and despite 38 years of revolutionary advances in medicine, science and technology,[7] all the while doing precious little seriously to consider whether it should be changed.

We believe the record amply demonstrates that the FAA has found it easier and more comfortable to do nothing about the Age 60 Rule. To change the Rule would require action by the FAA. For example, individualized health and performance screening of pilots would probably require norming and standardizing of cognitive tests and simulator

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[5] While noting that "it is difficult to imagine an agency decision which judges would be more disposed to accept than one that implicates aviation safety," the dissent below stated that "deference to agency expertise cannot be allowed to become toleration of arbitrary agency action—or in this case inaction—even in an area as critical as aviation safety." Pet. App. A at a-39.

[6] Even law enforcement officers routinely administer simple tests to suspected drunken drivers to determine cognitive and performance ability, yet the FAA eschews individualized health and performance monitoring of pilots of airplanes each carrying hundreds of people thousands of feet above the ground at speeds in excess of 500 miles per hour, in favor of an age-based Rule.

[7] In 1959, when the Age 60 Rule was enacted, jet aircraft were just being introduced to U.S. airline fleets, *see, e.g.*, Letter of April 30, 1959 of C.R. Smith, President, American Airlines to General Elwood Quesada, FAA Administrator (R. 626-27), and the computer chip was unheard of. Today, any consumer with a computer can purchase *Microsoft Flight Simulator* 98 software for $49.95 and experience a more detailed and realistic impression of actual flying than existed until the 1980's on the most sophisticated commercial aircraft flight simulators. *See, e.g.*, http://srch.outpost.com. In the same period, the FAA has seen fit to do nothing with the Age 60 Rule.

performance checks. Perhaps individualized determinations would result in more administrative and even legal challenges than are now the case under an arbitrary age cut-off of 60.

Who could blame the FAA for not wanting to enter that thicket—except that the FAA is statutorily charged to monitor the safety of aviation and given the exclusive responsibility to do so.[8] Inaction might be justified were not the means at hand to plumb medical condition, assess cognitive ability, and test performance and endurance in the real-time, realistic conditions of the flight simulator. Most important, individualized screening would make for a fairer and a safer scheme and one that did not conflict with the congressional mandate barring age discrimination.

Petitioner advocates a higher standard of review than "arbitrary and capricious" of the FAA's refusal to change the Rule, because the FAA's Rule infringes on congressional civil rights policy as manifested in the ADEA, EEOC regulations and *Western Air Lines, Inc. v. Criswell,* 472 U.S. 400 (1985) (Pet. at 22). SWAPA believes there is an additional important reason for greater scrutiny of the FAA's decision.

As the expert arbiter of air safety, the FAA also controls the means to evaluate whether safety is affected by a pilot's age. In its refusal even to study pilots over age 60,

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[8] While the National Safety Transportation Board is charged with safety investigation of civil aviation accidents, its charter is to act with regard to specific accidents. 49 U.S.C. §1131(a)(1). Its charter can be said to be reactive, even though lessons learned from accidents often find their way into Safety Recommendations to which the Secretary of Transportation must respond. 49 U.S.C. §1135(a). On the other hand, the FAA's statutory charge is to "*promote* safe flight of civil aircraft . . . ." [emphasis added] 49 U.S.C. §44701(a). The FAA's 38 years' inaction on the Age 60 Rule raises the question whether the FAA has carried out its statutory mandate to *promote* safe flight.

the FAA has abused its power by blocking any change in the Rule and simultaneously precluding investigation of whether abolition or modification of the Rule is appropriate. Given the congressional condemnation of age discrimination embodied in the ADEA and the dual nature of the FAA's role, the FAA's actions should be subjected to a higher degree of judicial scrutiny than the deferential "arbitrary and capricious" standard applied by the court below.

CONCLUSION

We are not asking this Court to decide how long commercial pilots should fly or how medical examination and testing should occur. But we think the record contains more than enough evidence that the FAA is simply too content to maintain the *status quo*, even after 38 years, and will not act without judicial intervention.

We do not necessarily advocate that the Court should strike down the Age 60 Rule as violative of the ADEA. What we do advocate is that the FAA on this record should be subject to a higher standard of review where its Age 60 Rule violates at least the spirit of the ADEA; where there is clear evidence that the means of assessing health, cognitive testing and simulator development have radically advanced since 1959; and where in 38 years the FAA has done too little even to consider whether a change is merited.

Respectfully submitted,

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